

Rule 615. Excluding Witnesses.

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

- (a) a party who is a natural person;
- (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;
- (c) a person whose presence a party shows to be essential to presenting the party's claim or defense;
- (d) a person authorized by statute to be present; or
- (e) a victim of crime, as defined by applicable law, who wishes to be present during proceedings against the defendant.

Comment to 2012 Amendment

This rule has been amended to conform to Federal Rule of Evidence 615, including the addition of subsection (d).

Subsection (e) (formerly subsection (d)), which is a uniquely Arizona provision, has been retained but amended to reflect that "a victim of crime" means a crime victim "as defined by applicable law," which includes any applicable rule, statute, or constitutional provision. The rule previously provided that "a victim of crime" would be "as defined by Rule 39(a), Rules of Criminal Procedure."

Additionally, the language of Rule 615 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

Comment to 1991 Amendment

The 1991 amendment to Rule 615 was necessary in order to conform the rule to the victim's right to be present at criminal proceedings, recognized in Ariz. Const. Art. II, § 2.1(A)(3).

Author's Comment

Rule 9.3(a) of the Arizona Rules of Criminal Procedure provides as follows:

Rule 9.3. Exclusion of witnesses and spectators.

a. Witnesses. The court may, and at the request of either party shall, exclude prospective witnesses from the courtroom during opening statements and the testimony of other witnesses. The court shall also direct them not to communicate with each other until all have testified. If the court finds that a party's claim that a person is a prospective witness is not made in good faith, the person shall not be excluded from the courtroom. Once a witness has testified on direct examination and has been made available to all parties for cross-examination, the witness shall be allowed to remain in the courtroom unless the court finds, upon application of a party or witness, that the presence of the witness would be prejudicial to a fair trial. Notwithstanding the foregoing, the victim, as defined in Rule 39a, Rules of Criminal Procedure, shall have the right to be present at all proceedings at which the defendant has such right.

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b. Spectators. All proceedings shall be open to the public, including representatives of the news media, unless the court finds, upon application of the defendant, that an open proceeding presents a clear and present danger to the defendant's right to a fair trial by an impartial jury. A complete record of any closed proceedings shall be kept and made available to the public following the completion of trial or disposition of the case without trial.

c. Protection of witness. The court may, in its discretion, exclude all spectators except representatives of the press during the testimony of a witness whenever reasonably necessary to prevent embarrassment or emotional disturbance of the witness.

d. Investigator. If an exclusion order is entered, both the defendant and the prosecutor shall nevertheless be entitled to the presence of one investigator at counsel table.

Cases

615.025 Under the Victims' Bill of Rights, if the victim is a minor, the victim's parent may exercise all of the victim's rights in addition to the victim, including the right to be present during all proceedings when the defendant has the right to be present; when a parent is to be a witness, this provision conflicts with Rule 615, so the Constitutional provisions prevails, and thus Rule 615 will not preclude a parent from being a witness.

State v. Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶¶ 58-59 (1999) (trial court did not err in refusing to exclude minor victim's mother, who was also a witness).

State v. Uriarte, 194 Ariz. 275, 981 P.2d 575, ¶¶ 17-19 (Ct. App. 1998) (defendant was charged with child molestation, sexual conduct with minor, and public sexual indecency involving his 12-year-old sister-in-law; during trial, victim's mother was in courtroom, and defendant objected when state called mother as rebuttal witness; court rejected defendant's contention that parent may only exercise rights "instead of" victim and not "in addition to" victim, and held instead that victim and parent may exercise rights together).

615.030 There is no general requirement that a party must invoke the rule at a particular time or else lose the right to invoke it at all.

State v. Edwards, 154 Ariz. 8, 13-14, 739 P.2d 1325, 1330-31 (Ct. App. 1986) (if trial court asks parties if they wish to invoke rule and they decline to do so, one party presents its case and then asks trial court to invoke rule while other party is presenting its case, first party would lose right to have trial court invoke rule only upon showing that party intentionally deceived or "sandbagged" other party).

615.040 Rule 9.3(d), ARIZ. R. CRIM. P., states that a party is allowed to have an investigator present, which means a person who has acquired factual information and is in a position to call counsel's attention to factual matters of which counsel may not be aware.

State v. Wilson, 185 Ariz. 254, 259-60, 914 P.2d 1346, 1351-52 (Ct. App. 1995) (trial court did not abuse its discretion in excluding person who had photographed crime scene for defendant and had digested transcripts from first trial, but did not have any background as investigator, did not interview any witnesses, and did not testify about her investigation in this case).

615.050 Although Rule 9.3(d), ARIZ. R. CRIM. P. states a party is allowed to have one investigator present, if the party shows that more than one person is essential for the presentation of the party's case, the trial court may allow more than one person to be present throughout the trial.

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State v. Williams, 183 Ariz. 368, 379–80, 904 P.2d 437, 448–49 (1995) (because different officer investigated each of two separate crimes that were joined for trial, trial court properly allowed state to have two officers present throughout trial).

615.060 Even though the trial court has invoked the rule excluding a witness, a party may allow its expert witnesses to review transcribed testimony in order to prepare their testimony.

McGuire v. Caterpillar Tractor Co., 151 Ariz. 420, 425, 728 P.2d 290, 295 (Ct. App. 1986) (court cited as authority M. UDALL & J. LIVERMORE, ARIZONA LAW OF EVIDENCE § 64 (2d ed. 1982), which states, “[O]ne party’s expert might be allowed to hear the other party’s expert testify so as to be able to suggest lines of inquiry on cross-examination.” J. LIVERMORE, R. BARTELS, & A. HAMEROFF, ARIZONA PRACTICE, LAW OF EVIDENCE § 615:1 at 389 (Rev. 4th ed. 2008), now states, “Thus, even though an exclusion order has been requested and made, the Court can permit one side’s expert witness to hear or review the testimony of the opposing side’s expert in order to be in a position to suggest areas for cross-examination.”).

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